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No. 89-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CITY OF IDAHO FALLS, IDAHO,
Petitioner,

v.

PROJECT 80's, INC. and
DAVID JOHN FITZEN,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

Petitioner argues that certiorari should be granted in this case because the 9th Circuit adopted and applied the least restrictive means test to determine whether the Citys' ordinances measure up to the First Amendment protection of commercial speech.

This Court's grant of certiorari, however, should turn on the broadest basis relied upon by the 9th Circuit to support its decision. Although the 9th Circuit Court did discuss its support of the least restrictive means test, that is not the only basis for its decision. The 9th Circuit Court's ruling is well supported by rationale cited in the Court's opinion that does not rely upon the least restrictive means test.

This is exemplified in the very means the lower Court used to express its support for the least restrictive test. That notation is contained in a footnote, not in the body of the Court's opinion. The remainder of the lower Court's opinion makes it clear that it is not applying the
test to the full extent of the superlative "least" but rather requiring that reasonable alternative channels of communication be left open. The Court cited several alternatives that were not as restrictive as a total ban. These included posting a notice or sign, establishing a central registry, requiring licensing, imposing criminal violations on those who ignore a posted sign, and using identification devices for solicitors. The Court then stated "The existence of such alternatives precludes the broad prohibition enacted by Idaho Falls and Pocatello." *Project 80's, Inc. V. City of Pocatello,* No. 86-4348, slip. op. at 5592-93 (9th Cir. May 25, 1989).

The 9th Circuit recognized that the ordinances in question, which are total bans, are far broader than necessary. They prohibit free speech much more substantially than the *least* restrictive alternative. It is the breadth of these total prohibitions that the Circuit Court found unreasonable, when it stated: "By sweeping far more broadly than necessary to protect privacy, the ordinances fail to satisfy the fourth requirement of *Central Hudson*." *Id*., at 5594.

In their request for certiorari, Petitioner indicates that an issue to be decided by this case is whether the least restrictive means test should have been applied or not. That issue was already visited by this Court in the *Board of Trustees of the State University of New York v. Fox*, No. 87-2012, slip op. (U.S. June 29, 1989), 109 S.Ct. 3028, 106 L.Ed. 388. The *Fox* decision is the law at this point there is no need to revisit the issue of appropriateness of applying the least restrictive means test. Instead, this Court should recognize that the 9th Circuit's decision is based on a determination that the ordinances in question are far short of those which can reasonably be imposed to accomplish the City's desired objectives.

The 9th Circuit Court expressed this at page 5598:

> Even if we assume that the "least restrictive alternative" re quirement need not, in all good sense, be employed to the full extent of the superlative "least" the ordinances of

> Idaho Falls and Pocatello fall far short of any reasonable re quirement of necessity. . . .

Then after again restating the several and varied alternatives available to the city, the Court stated:

> By rejecting such reasonable alternatives in favor of a total prohibition on uninvited solicitation, these ordinances violate the First Amendment commercial speech rights of Project 80's.

Project 80's, Inc. v. City of Pocatello, supra at 5599.

This Court does not need to grant certiorari to reconsider the *Fox* decision that a "reasonable fit" test is appropriate for protection of commercial free speech. Especially since the 9th Circuit decision here does not stand on a least restrictive means test, but rather upon its decision that the absolute prohibitions contained in these two ordinances are not even "reasonable," since several means exist to accomplish the goals of the City without imposing an absolute prohibition of all door-to-door sales activities.

As discussed in the *Fox* decision, "almost all of the restrictions disallowed under *Central Hudson's* fourth prong having been substantially excessive." *Board of Trustees v. Fox, supra,* 109 S.Ct. 3028, 3034. The 9th Circuit Court in its opinion recognized that the restrictions imposed by the City of Idaho Falls and Pocatello are substantially excessive. They are not close to any reasonable restriction and thus were determined by the 9th Circuit to violate the First Amendment's protection of commercial speech.

Of course, the 9th Circuit did not have the benefit of the *Fox* decision in formulating its opinion in the Project 80's case. However, if it had it is clear that its decision is in the line with Fox. In formulating the "reasonable fit" test, the Fox Court characterized it as "something short of the least restrictive means standard." Board of Trustees v. Fox, supra, 109 S.Ct. 3028, 3033. The 9th Circuit has found the ordinances of these two cities to be much more than a "little short" of the least restrictive means; it found them to be "far short of any reasonable requirement of necessity" (*Project 80's, Inc. v. City of Pocatello, supra* at 5598) and that they swept "far more

broadly than necessary to protect privacy." *Id*. at 5594. The 9th Circuit decision stands without reliance on the least restrictive means test. These two ordinances are too broad since they ignore a multitude of reasonable alternatives and thus offend the commercial speech protection provided by the First Amendment as has been designed by this Court in *Central Hudson* and *Fox*.

SUMMARY

There are no issues presented by Petitioner's application for certiorari which need be decided by the Supreme Court of the United States of America. Existing decisions of this Court appropriately address the standards to be used in applying First Amendment protection to commercial speech. The 9th Circuit has found the ordinances in question are far excessive of any reasonable means to accomplish the Citys' goals of protecting privacy. For these reasons, the Petitioner's application for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 4 day of December, 1989 .

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AFFIDAVIT OF SERVICE

MIKE BURKETT, being first duly sworn upon oath, deposes and says:

Pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of respondents Project 80's, Inc.'s and David John Fitzen's Brief of Respondents on each party required to be served, including the following:

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by depositing the same in the United States mail, first-class mail, postage prepaid on the 4 day of December, 1989.

DATED this 4 day of December, 1989.

Mike Burkett